Supreme Court, U.S.
FILED

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No.

In The
Supreme Court of the United States
October Term, 1996

ONE PARCEL PROPERTY LOCATED AT LOT 85, COUNTRY RIDGE, A SUBDIVISION IN THE CITY OF LENEXA, JOHNSON COUNTY, KANSAS, A/K/A 8940 HALL, LENEXA, KANSAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON,
Petitioner,

STEVEN M. MUCHNICK,
Claimant,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MCCONWELL LAW OFFICES
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81pp

QUESTIONS PRESENTED FOR REVIEW

1. DID THE UNITED STATES' FAILURE TO PROVIDE A PREATTACHMENT NOTICE OR HEARING AND FAILURE TO ADHERE TO THE REQUIREMENTS OF 21 U.S.C. §881 VIOLATE STEVEN M. MUCHNICK'S FIFTH AMENDMENT RIGHTS AND NECESSITATE DISMISSAL OF THE ACTION?

2. CAN THE UNITED STATES DISTRICT COURT OBTAIN IN REM JURISDICTION OVER LOT 85 PRIOR TO FINAL DISPOSITION OF A STATE COURT MATTER?

PARTIES TO THE PROCEEDINGS

The Petitioner (Defendant) is One Parcel Property located at Lot 85, Country Ridge, a subdivision in the City of Lenexa, Johnson County, Kansas, with all appurtenances and improvements thereon. Petitioner is owned by Claimant, Steven M. Muchnick. The Respondent (Plaintiff) is the United States of America.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW . i

PARTIES TO THE PROCEEDINGS . . ii

TABLE OF AUTHORITIES . . . . v-vii

OPINIONS BELOW 1

BASIS FOR JURISDICTION 2

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES & REGULATIONS INVOLVED IN THIS CASE 3

STATEMENT OF THE CASE 5

a. Material Facts Relevant to Questions Presented 5

b. Federal Jurisdiction in the United States Court of Appeals for theTenth Circuit 8

ARGUMENT 9

1. Did the United States' failure to provide a preattachment notice or hearing and failure to adhere to the requirements of 21 U.S.C. §881 violate Steven M. Muchnick's Fifth Amendment rights and necessitate dismissal of the action? 9

2. Can the United States District Court obtain in rem jurisdiction over Lot85 prior to final disposition of a state court matter? . . . 15

CONCLUSION 18

APPENDIX . . . . . A-C

TABLE OF AUTHORITIES

CASES:

City of Lenexa, Kansas v. Lot 85, Country Ridge, et al., Case No. 90-C-425 5

Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 55 S.C. 386, 79 L.Ed 850(1935) 15

United States v. $79,124.49 US, 830 F.2d 94 (1987) 17

United States v. 2751 Peyton Woods Trail, 66 F.3d 1164 (11th Cir 1995) 14

United States v. 51 Pieces of Real Property, Roswell, N.M., 17 F.3d 1306, 1315-16 (10th Cir. 1994) 11

United States v. All Assets and Equipment of West Side Building Corp.,58 F.3d 1181 (7th Cir 1995) 14

United States v. James Daniel Good Real Property, et al., 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) . . . 9, 12

United States v. Marsh, 105 F.3d 927 (4th Cir. 1997) . 14

United States v. One Parcel of Real Property Located at 9638 Chicago Heights, St. Louis, Missouri, 27 F.3d 327 (1994) . 13

United States v. One Parcel Property, Lot 85, 100 F.3d 740 (1996) 2, 12

United States v. One Parcel Property, Lot 85, 894 F.Supp. 397 1

United States v. Real Property Located at 20832 Big Rock Drive, Malibu, 51 F.3d 1402 (9th Cir.1995) 14

STATUTES, RULES & REGULATIONS:

K.S.A. §60-241 . . . . . 7, 16

K.S.A. §60-256 16

K.S.A. §60-2103 16

21 U.S.C. §881 9

21 U.S.C. §881(a)(7) 4

28 U.S.C. §1254 2

28 U.S.C. §1291 8

28 U.S.C. §1345 9

28 U.S.C. §1355 9

PETITION FOR WRIT OF CERTIORARI

Petitioner One Parcel Property located at Lot 85, Country Ridge, A subdivision in the City of Lenexa, Johnson County, Kansas, with all appurtenances and improvements thereon (hereinafter referred to as "Lot 85") hereby petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for Tenth Circuit.

OPINIONS BELOW

The United States District Court for the District of Kansas minute order dated July 26, 1995, denying Lot 85's Motion to Dismiss is set out at page B-1. The United States District Court for the District of Kansas memorandum order dated July 25, 1995, granting summary judgment in favor of the United States of America is set out at pages C-1 through C-19. United States v. One Parcel Property, Lot 85, 894 F.Supp. 397. The United

States Court of Appeals for the Tenth Circuit decision entered November 12, 1996, affirming the United States District Court for the District of Kansas orders is set out at pages A-1 through A-12. United States v. One Parcel Property, Lot 85, 100 F.3d 740 (1996).

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 12, 1996. No petition for rehearing was filed by any party. Jurisdiction shall be proper in this Court pursuant to 28 U.S.C. §1254 which gives the United States Supreme Court the power to review decisions of the United States Court of Appeals and Supreme Court Rule 13 which requires filing of a Writ within ninety (90) days of entry of last judgment. The ninetieth day was February 10, 1997. On February 4, 1997, the Honorable Justice

Steven Beyer entered an order extending the date for filing this Petition for Writ of Certiorari to and including March 12, 1997.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES & REGULATIONS INVOLVED IN THIS CASE

The Constitutional provision applicable to this matter is:

> Fifth Amendment to the United States Constitution. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War or public danger; nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb nor

> shall be compelled in any Criminal Case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*, nor shall private property be taken for public use, without just compensation." [Emphasis added]

The applicable federal statute is: 21 U.S.C. §881(a)(7). "**Subject property.** The following shall be subject to the United States and no property right shall exist in them: "...(7) All real property, including any right, title, interest (including any leasehold interest) in the whole of any lot or tract of land and appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment...."

STATEMENT OF THE CASE

a. Material Facts Relevant to Questions Presented

Claimant Steven M. Muchnick (hereinafter referred to as "Muchnick") was arrested at his home on December 14, 1989, by City of Lenexa, Johnson County, Kansas police. Subsequent to the arrest, criminal charges were filed against Muchnick in the District Court of Johnson County, Kansas. On January 11, 1990, a civil forfeiture action was brought by City of Lenexa in the District Court of Johnson County, Kansas, styled City of Lenexa, Kansas v. Lot 85, Country Ridge, et al., Case No. 90-C-425, and sought the forfeiture of Lot 85, Muchnick's car and $237.00 U.S. cash which was found in Lot 85 at the time of Muchnick's arrest. The Johnson County, Kansas criminal charges were dismissed however, following criminal charges being filed in the United States District Court for the Western District of Missouri.

Subsequent to Muchnick's trial and conviction in the Western District of Missouri, the Johnson County, Kansas District Attorney refiled criminal charges against Muchnick. Muchnick and the State entered into a plea agreement on October 27, 1992.

In October 1992, all criminal matters had come to a conclusion, but the civil forfeiture action was still pending. Unbeknownst to Muchnick, the City of Lenexa contacted the United States attorney and requested that the United States file a civil forfeiture action against Lot 85 without notice and/or a hearing. On Tuesday, December 8, 1992, the United States filed an in rem forfeiture action against Lot 85, but misidentified Lot 85. Without notice and/or a hearing, on Tuesday, December 15, 1992, the United States amended its Petition to provide for a correct legal description of Lot 85. Without notice and/or a hearing, the United States Magistrate issued a warrant

for the arrest of Lot 85. On late Friday, December 18, 1992, the attorney for the City of Lenexa took an ex parte order to a Johnson County, Kansas judge, other than the assigned judge, and obtained a voluntary order dismissing Lot 85 without prejudice from the suit. The order did not comply with K.S.A. §60-241. Lot 85 properly and timely sought relief from the improper, ex parte order. The December 18, 1992 order was set aside nunc pro tunc and found to be void by the judge assigned to the case on January 21, 1993. Lot 85 obtained a judgment on the merits on March 30, 1993. All issues in the case were finally resolved in June 1993.

On Tuesday, December 22, 1992, without notice and/or a hearing, the United States Marshal, accompanied by the Lenexa swat team and police, seized Lot 85. No exigent circumstances existed.

b. Federal Jurisdiction in the United States Court of Appeals for the Tenth Circuit

Although original jurisdiction in the District Court is disputed by Lot 85 and claimant Steven M. Muchnick, appellate jurisdiction was valid in the United States Court of Appeals pursuant to 28 U.S.C. §1291. The United States District Court for the District of Kansas entered the Decree of Forfeiture on December 1, 1995, which finally disposed of all the issues. The Decree was entered on the Court's docket on December 4, 1995. Lot 85 filed its Notice of Appeal on December 11, 1995, and the Notice of Appeal was entered on the docket on December 12, 1995. Lot 85 appealed the Minute Order of the United States District Court which denied Lot 85's Motion to Dismiss, the Memorandum and Order granting United States' Motion for Partial Summary Judgment and the Decree of Forfeiture.

Jurisdiction of the United States District Court for the District of Kansas was based upon 28 U.S.C. §1345 and 28 U.S.C. §1355. Lot 85 and Claimant Steven M. Muchnick deny that the United States District Court for the District of Kansas had jurisdiction over Lot 85 in this matter.

ARGUMENT

1. Did the United States' failure to provide a preattachment notice or hearing and failure to adhere to the requirements of 21 U.S.C. §881 violate Steven M. Muchnick's Fifth Amendment rights and necessitate dismissal of the action?

This Court should grant certiorari in that a) the United States Court of Appeals for the Tenth Circuit failed to follow this Court's holding in United States v. James Daniel Good Real Property, et

al. 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993), and b) a conflict exists among the United States Courts of Appeals. Rather than following this Court's determination in Good that seizure of real property requires deference to both the Fourth Amendment of the United States Constitution and the Fifth Amendment of the United States Constitution, the Tenth Circuit applied only the Fourth Amendment Rationale. That being: if illegally seized evidence is not used as the basis of the forfeiture, it does not matter that Constitutional rights are trammeled.

In this case, it is uncontroverted that a) no preseizure notice was afforded, b) no preseizure hearing was had, and c) no exigent circumstances existed. It is uncontroverted that the United States sought the possessory interest in Lot 85 and that no lis pendens was filed. In response to Lot 85's, and Muchnick's claim that the failure to afford preseizure

notice and/or hearing violated the Fifth Amendment and therefore the action should properly be dismissed, the Tenth Circuit Stated:

> The district court found that Mr. Muchnick's right to due process was violated when Lot 85 was seized before receiving notice or a hearing. On appeal, the Defendant argues that the proper remedy for this violation is the dismissal of the forfeiture action.
>
> The Tenth Circuit has already held that a due process violation such as this one does not invalidate the forfeiture as long as evidence obtained in the illegal seizure is not used against the claimant in the forfeiture proceedings. United States v. 51 Pieces of Real Property, Roswell, N.M., 17 F.3d 1306, 1315-16 (10th Cir. 1994). In addition, the government must return to the claimant any rents that accrued

> during the period of the illegal seizure. Id. at 1316. No evidence obtained during the illegal seizure was used against the Defendant in the forfeiture proceedings, and no rents accrued during the period of the illegal seizure. Indeed, Mr. Muchnick entered into an agreement with the federal marshal which permitted him to occupy the property during the pendency of the forfeiture proceeding. Under the law of this circuit, dismissal of the action is not required. United States v. One Parcel Property, 100 F.3d 740 (1996). See Appendix p. A-10.

The Tenth Circuit's decision ignores the effect of the Fifth Amendment. The court instead provided a Fourth Amendment analysis. This analysis and ruling is in conflict with Good and with the Eighth Circuit.

The United States Court of Appeals for the Eighth Circuit in United States v. One Parcel of Real Property Located at 9638 Chicago Heights, St. Louis, Missouri, 27 F.3d 327 (1994) held that "[t]he lack of notice and a hearing prior to the issuance of an arrest warrant for the seizure of the Long residence renders that warrant invalid and unconstitutional." Id at 330. The Court dismissed the action because the seizure was conducted pursuant to an invalid warrant. The Eighth Circuit determined that suppression of evidence was an appropriate remedy for Fourth Amendment violations, but that suppression afforded no remedy where the purpose of the seizure is to assert a possessory interest over the property. Id at 330. In this case, Ms. Long, the claimant, pled to several drug offenses. The United States seized her real property without notice or hearing. Further, no exigent circumstances existed.

The United States Court of Appeals for the Eleventh Circuit agreed with the Eighth Circuit in United States v. 2751 Peyton Woods Trail, 66 F.3d 1164 (11th Cir 1995).

The United States Court of Appeals for the Seventh Circuit in United States v. All Assets and Equipment of West Side Building Corp, 58 F.3d 1181 (7th Cir 1995); the United States Court of Appeals for the Ninth Circuit in United States v. Real Property Located at 20832 Big Rock Drive, Malibu, 51 F.3d 1402 (9th Cir.1995); and the United States Court of Appeals for the Fourth Circuit in United States v. Marsh, 105 F.3d 927 (4th Cir. 1997) opined that suppression of evidence was the proper remedy for illegal seizure.

The Fourth Circuit in Marsh stated that there was a conflict among the circuits concerning this very issue. It appears the split concerns application and effect of the Fifth Amendment. Petitioner

asserts that the vital issue of constitutional protections of the Fifth Amendment should be addressed by this Court, and that the analysis of the Fourth and Eleventh Circuits.

2. Can the United States District Court obtain in rem jurisdiction over Lot 85 prior to final disposition of a state court matter?

This Court held in Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 55 S.C.. 386, 79 L.Ed 850 (1935) that the court first assuming jurisdiction over the property may maintain and exercise jurisdiction to the exclusion of the other. Id at 195.

The United States Court of Appeals for the Tenth Circuit held that the United States District Court obtained jurisdiction through the improper voluntary dismissal entered by the District Court of Johnson County, Kansas; and this holding is in conflict with the

Seventh Circuit. Appendix A-6 through A-9. The ultimate question is: At what point would the court in Johnson County lose jurisdiction?

The order signed by the Court on December 18, 1992, is invalid and not in accordance with K.S.A. §60-241 which requires that no voluntary dismissal shall be had following the appearance of the defendant without notice and order of the court. Notwithstanding Lot 85, there were still remaining issues pending before the Court. The District Court set aside the voluntary dismissal as void, and on March 30, 1993, entered summary judgment in favor of Lot 85. Pursuant to K.S.A. § 60-256, a summary judgment order is an interlocutory order. The remaining issues were not disposed of until June 4, 1993, and pursuant to K.S.A. §60-2103 the District Court would retain jurisdiction until the time for appeal had run, or the case was docketed with the Kansas Court of Appeals.

The Tenth Circuit held that upon the signing of the voluntary dismissal, whether it was a void order or not, whether the matter was finally disposed of or not, the United States obtained jurisdiction over unsuspecting Lot 85.

The United States Court of Appeals for the Seventh Circuit in United States v. $79,124.49 US, 830 F.2d 94 (1987) is in conflict with the Tenth Circuit. In that case the United States marshal attempted to seize currency from the state court clerk following the state courts dismissal of the currency, but *prior to the final disposition of the action*. The Seventh Circuit held that the United States could not obtain jurisdiction over the currency until final disposition of the state action.

CONCLUSION

Pursuant to the conflict in the United States Court of Appeals and for the above and foregoing reasons, writ of certiorari is proper.

Respectfully submitted,

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April 25, 1997

APPENDIX A

Appeal from the United
States District Court
for the District of Kansas
(D.C. No. 92-CV-1601)

Dated: November 12, 1996

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee,	)
vs.	)
	) No.95-3405
ONE PARCEL PROPERTY LOCATED AT LOT 85, COUNTY RIDGE, A SUBDIVISION IN THE CITY OF LENEXA, JOHNSON COUNTY,KANSAS, also known as 8940 HALL, LENEXA, KANSAS,WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON	)
Defendant-Appellant.	)

STEVEN M. MUCHNICK,)
)
Claimant.)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF KANSAS
(D.C. No. 92-CV-1601)

Laura L. McConwell, Law Office of Edward A. McConwell, Overland Park, Kansas, for Defendant - Appellant.

Michael G. Christensen, Assistant United States Attorney (Jackie N. Williams, United States Attorney, Annette B. Gurney and Connie R. DeArmond, Assistant United States Attorneys, with him on the brief), Wichita, Kansas, for Plaintiff - Appellee.

Before ANDERSON, KELLY, and LUCERO, Circuit Judges.

KELLY, Circuit Judge.

Appeal is taken from the district court's order of forfeiture of one parcel of properly located in the City of Lenexa, Kansas. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

Background

Pursuant to a valid court order, law enforcement officials monitored Steven M. Muchnick's home at 8940 Hall in Lenexa, Kansas ("Lot 85") for approximately two weeks in November and December, 1989. During that period, 154 telephone conversations involving drugs or drug use occurred at Lot 85; 94 of these conversations involved actual drug transactions. Based on this

information, Mr. Muchnick was arrested and charged by both federal and state officials with a number of drug-related offenses. Mr. Muchnick was convicted don fifteen separate counts by the federal district court for the Western District of Missouri, and subsequently pled guilty in the state district court of Johnson County, Kansas. During his plea proceeding, Mr. Muchnick admitted that he made telephone calls from Lot 85 to arrange drug transactions, and that he stored anabolic steroids there.

While the criminal charges were pending against Mr. Muchnick, on January 11, 1990, the City of Lenexa, Johnson County, Kansas, initiated a forfeiture proceeding in the state district court against Lot 85, Mr. Muchnick's car, and $237.00. Because of a Kansas Supreme Court decision holding that homesteads cannot be forfeited under state drug laws, however, federal authorities instituted forfeiture proceedings

against Lot 85. The federal forfeiture action was initiated under 21 U.S.C. § 881(a)(7) on December 8, 1992. The city had agreed with federal authorities to obtain a dismissal of Lot 85 from the state-law forfeiture proceeding after the federal action was brought. The voluntary dismissal was obtained from the state district court on December 18, 1992. On December 22, 1992, Lot 85 was seized by federal marshals, acting pursuant to a federal warrant. The seizure occurred without notice or a hearing.

The Defendant moved in the state district court to have the voluntary dismissal of the state proceeding set aside *nunc pro tunc*. The Defendant argued that the order granting the motion for voluntary dismissal was infirm because it was not signed by a judge of the district in which the action was pending and did not comply with Kansas Rules of Civil Procedure for

dismissal of an action. That motion was granted from the bench on January 21, 1993, and an order entered on March 4, 1993. Lot 85 was ultimately dismissed from the state forfeiture proceeding on March 30, 1993.

On January 25, 1993, the Defendant and Mr. Muchnick moved in the federal district court for dismissal of the federal forfeiture action against Lot 85, arguing that the federal district court did not have jurisdiction over Lot 85 because of the pendency of the state action. The movants apparently reasoned that the *nunc pro tunc* order setting aside the voluntary dismissal revived the state court's jurisdiction despite the seizure of the property by federal authorities. The motion for dismissal was denied, and on July 26, 1995, the federal district court granted summary judgment in favor of the United

States. A decree of forfeiture of Lot 85 was entered on December 1, 1995.

Discussion

We reviewed jurisdictional and constitutional claims de novo. Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959, 969 (10th Cir. 1996); United States v. Angulo-Lopez, 7 F.3d 1506, 1508 (10th Cir. 1993), cert. denied, 114 S. Ct. 1563 (1994).

The Defendant raises three issues in this appeal. First, it argues that the federal district court lacked jurisdiction over the property and therefore erred in denying its motion to dismiss. Second, the Defendant argues that the district court erred in failing to dismiss the action as the proper remedy for the violation of Mr. Muchnick's right to due process. Third, the Defendant argues that the seizure of the property amounted to

an excessive fine in violation of the Eighth Amendment.

In its initial brief, the Defendant raised a fourth issue; namely, that the forfeiture of Lot 85 under 18 U.S.C. § 881(a)(7) violated the Double Jeopardy Clause of the Fifth Amendment to the Constitution. Since the briefs were filed in this appeal, the Supreme Court has resolved this issue. In United States v. Ursery, 116 S. Ct. 2135 (1996), the Court held that civil forfeiture under § 881(a)(7) were not punishment for purposes of the Double Jeopardy Clause. Id. at 2149.

I. Jurisdiction

The Defendant argues that the federal district court was without jurisdiction over the property because of the pendency of the forfeiture proceeding in the state district court. The foundation for Defendant's argument is a rule which

applies when two courts seek to assert in rem jurisdiction over the same property in essentially the same type of action. Penn Gen. Casualty Co. v. Pennsylvania, 294 U.S. 189, 195 (1935). In such a case, the court first asserting jurisdiction over the property has the power to decide the case without interference from other courts, even though those courts may have had jurisdiction over the property had they exercised that jurisdiction first. Id. This first-in-time rule applies to in rem proceedings in both federal and state courts. It stands as the lone exception to the general rule that the pendency of a prior suit does not bar another suit for the same cause of action in a different court having concurrent jurisdiction. Donovan v. City of Dallas, 377 U.S. 408, 412 (1964); Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 465-66 (1939).

Although the rule relied on by the Defendant has an admirable pedigree, it is not applicable to the facts before us. The cases in which the rule was established, and those which it applies, involve separate tribunals vying for jurisdiction over the same property. Princess Lida, 305 U.S. at 456; Penn Gen. Casualty, 294 U.S. at 194; Cassity v. Pitts, 995 F.2d 1009 (10th Cir. 1993); United States v. $79,123.49 in United States Cash & Currency, 830 F.2d 94 (7th Cir. 1987). For instance, in $79,123.49, the State of Wisconsin commenced a forfeiture action regarding property seized during a drug arrest. The case was dismissed for noncompliance with statutory time limits, but the court placed a stay on its order turning the property over to claimant's counsel. Before the stay expired, however, the United States Marshal seized the property from the county courthouse. 830 F.2d at 95-96. The Seventh Circuit held that the first-in-time rule applied and

deprived the federal court of jurisdiction over the property, nothing that the case presented "all of the logistical problems and potential for federal-state conflict inherent in two courts simultaneously competing for control of one res." Id. at 97.

This case does not present a situation in which two tribunals simultaneously compete for jurisdiction over the same property. On October 30, 1992, the Kansas Supreme Court ruled that the Kansas Constitution protected homesteads from forfeiture under state law. State *ex rel.* Braun v. A. Tract of Land in the Northwest Quarter of Section 4, Township 11 South, Range 19 West of the 6th P.M., Ellis County, Kansas, 840 P.2d 453 (Kan. 1992). Consequently, state officials contacted federal authorities and requested that a forfeiture action be commenced under federal law. The federal district court was informed of the pendency

of the state proceeding, and of the City's agreement to dismiss that action at the same time the United States Marshal seized the property. On December 18, 1992, the City of Lenexa's motion to voluntarily dismiss the forfeiture action against Lot 85 was granted by the state district court. Lot 85 was seized by federal authorities on December 22, 1992. By granting the motion to dismiss, the state district court affirmatively relinquished its jurisdiction over Lot 85--and its power to prevent the federal district court from asserting jurisdiction over the property. The seizure by federal authorities on December 22, 1992, brought Lot 85 within the jurisdiction of the federal district court.

The forfeiture claim was filed in federal district court on December 8, 1992. On December 10, 1992, the federal

district court issued an order directing that a warrant of seizure of the property be issued. Although on these dates the state district court had exclusive jurisdiction to control the disposition of the property, neither of these actions in the federal district court interfered with the state district court's jurisdiction over the property or with that court's judicial processes. Penn Gen. Casualty, 294 U.S. at 198 ("While it is often said that of two courts having concurrent jurisdiction *in rem*, that one first taking possession acquires exclusive jurisdiction, it is exclusive only so far as its exercise is necessary for the appropriate control and disposition of the property. The jurisdiction does not extend beyond the purpose for which it is allowed, to enable the court to exercise it appropriately and to avoid unseemly conflicts. The other court does not thereby lost its power to make orders which do not conflict with

the authority of the court having jurisdiction over the control and disposition of the property.")(citations omitted); see also, United States v. Klein, 303 276, 282 (1938); First Charter Land Corp. v. Fitzgerald, 643 F.2d 1011, 1015 (4th Cir. 1981).

The Defendant further argues that the state district court did not at any time lose its jurisdiction over Lot 85. It contends that because the order dismissing Lot 85 from the suit was set aside *nunc pro tunc* from the bench on January 21, 1993, and entered in an order dated March 4, 1993, the state district court maintained exclusive jurisdiction over the property throughout. The Defendant offers no authority for its argument, and we have found none. Federal authorities seized Lot 85 on December 22, 1992, nearly one month before the order to set aside the dismissal was granted from the bench by the state district

court. Giving that *nunc pro tunc* order retroactive effect, as the Defendant urges, would create the potential for the "unseemly and disastrous conflicts in the administration of our dual judicial system" which the first-in-time rule relied upon by Defendant seeks to avoid. Penn Gen. Casualty, 294 U.S. at 195.

II. Remedy for Due Process Violation

The district court found that Mr. Muchnick's right to due process was violated when Lot 85 was seized before receiving notice or a hearing. On appeal, the Defendant argues that the proper remedy for this violation is the dismissal of the forfeiture action.

The Tenth Circuit has already held that a due process violation such as this one does not invalidate the forfeiture as long as evidence obtained in the illegal seizure is

not used against the claimant in the forfeiture proceedings. United States v. 51 Pieces of Real Property, Roswell, N.M., 17 F.3d 1306, 1315-16 (10th Cir. 1994). In addition, the government must return to the claimant any rents that accrued during the period of the illegal seizure. Id. at 1316. No evidence obtained during the illegal seizure was used against the Defendant in the forfeiture proceedings, and no rents accrued during the period of the illegal seizure. Indeed, Mr. Muchnick entered into an agreement with the federal marshal which permitted him to occupy the property during the pendency of the forfeiture proceeding. Under the law of this circuit, dismissal of the action is not required.

III. Excessive Fines

The Defendant argues that this civil forfeiture violates the Excessive Fines Clause of the Eighth

Amendment of the United States Constitution. In United States v. 820 Calle de Madero, Chaparral, Otero County, New Mexico, No. 96-2026 (10th Cir. 1996), we addressed the question left open by the Supreme Court in Austin v. United States, 509 U.S. 602, 623 n.15 (1993); namely, the methodology for determining whether a civil forfeiture is excessive and consequently violates the Constitution. In Calle de Madero, we recognized that, in a forfeiture proceeding, the government bears the initial burden of proving the requisite connection between the forfeited property and the offense. If this instrumentality test is satisfied, the forfeiture will not be considered excessive unless the claimant or defendant then shows that the forfeiture is grossly disproportionate in light of the totality of the circumstances surrounding the forfeiture. In evaluating proportionality, courts must consider the severity of the

offense with which the property was involved, the harshness of the sanction imposed, and the culpability of the claimant.

Using this methodology, we conclude that the forfeiture of Lot 85 does not violate the Excessive Fines Clause. The instrumentality test is more than satisfied by Mr. Muchnick's admissions regarding the illegal activities he engaged in at Lot 85. His use of his home in these activities was knowing and deliberate.

Additionally, the Defendant has not established that the sanctions imposed are grossly disproportionate to the offense involved. In evaluating the harshness of the sanction, we consider the property's estimated fair market value of $158,000. Mr. Muchnick was tried for fifteen separate violations of federal drug laws; he was found guilty on all counts and sentenced to two years probation. He was also

fined $1,200 and required to undergo three months of treatment.

Against these sanctions, we consider the serious nature of the offense with which Mr. Muchnick and the forfeited property were involved. Lot 85 was connected to numerous acts which violate the controlled Substances Act. E.g., 21 U.S.C. § 841(a)(1) (distribution of controlled substances); id. § 843(b) (use of a communications device to facilitate acts which violate Chapter 13, Subchapter I, of Title 21 of the United States Code); id. § 846 (conspiracy to violate Chapter 13). Congress has authorized stiff penalties for such violations; violators may be imprisoned for up to forty years and fined up to $2,000,000. Id. § 841(b)(1)(B). We are persuaded that, in view of the seriousness of these offenses, forfeiture of Lot 85 is not disproportionate and does not violate the Excessive Fines Clause.

AFFIRMED.

APPENDIX B

Minute Order of the United States
District Court of Kansas

Dated: July 26, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)
v.	) CIVIL ACTION NO.92-1601-FGT
ONE PARCEL PROPERTY LOCATED AT LOT 85, COUNTRY RIDGE, A SUBDIVISION IN THE CITY OF LENEXA, JOHNSON COUNTY, KANSAS A/K/A 8940 HALL, LENEXA, KANSAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON Defendant.	)

MINUTE ORDER

BY DIRECTION OF HON. FRANK G. THEIS, SENIOR JUDGE:

IT IS ORDERED that the Motion to Dismiss (Doc. 11) filed in the above captioned case shall be and is hereby denied. The Clerk shall transmit a copy of this Order to all counsel.

RALPH L. DE LOACH, CLERK

/s/Anne Butler, Deputy Clerk
Anne Butler, Deputy Clerk

APPENDIX C

Memorandum and Order of the United StatesDistrict Court of Kansas

Dated: July 27, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA, Plaintiff,	)
v.	) CIVIL ACTION NO.92-1601-FGT
ONE PARCEL PROPERTY LOCATED AT LOT 85, COUNTRY RIDGE, A SUBDIVISION IN THE CITY OF LENEXA, JOHNSON COUNTY, KANSAS A/K/A 8940 HALL, LENEXA, KANSAS, WITH ALL APPURTENANCES AND IMPROVEMENTS THEREON Defendant.	)

MEMORANDUM AND ORDER

This matter is before the court on the United States' motion for partial summary judgment (Doc. 40)

against the interest of the claimant Steven M. Muchnick (hereinafter "claimant" or "Muchnick"). This is a civil forfeiture action brought by the United States pursuant to 21 U.S.C. § 881(a)(7).

The following facts as set forth by the United States are uncontroverted.

1. Between November 29, 1989 and December 14, 1989, information obtained through intercepted phone communications pursuant to a valid court order on the telephone line servicing the two-story residence located at 8940 Hall, Lenexa, Kansas, and personal observations by law enforcement officers gave rise to evidence of a conspiracy to unlawfully sell and distribute cocaine, marijuana, diazepam, anabolic steroids, and 3, 4-Methylene-dioxymethamphetamine (3,4-M.D.M.A.), with the previously described real property being used or intended to be used to facilitate

the unlawful conspiracy of its owner, Steven M. Muchnick.

The claimant's attempt to controvert this statement of facts is unsuccessful. As discussed below, hearsay may be used to establish probable cause. Further, the claimant's affidavit is insufficient to defeat the motion for summary judgment.

2. On or about December 14, 1989, pursuant to a lawful search of the two-story residence located at 8940 Hall, Lenexa, Kansas, quantities of marijuana and diazepam, which are listed as controlled substances under Kan. Stat. Ann. 65-4105 and 65-4111, respectively, were discovered. These controlled substances and others were kept at the previously described real property for the purpose of facilitating the unlawful sale and distribution of these controlled substances.

The claimant's attempt to controvert this statement of facts is unsuccessfully for the same reasons set forth in paragraph 1.

3. Between November 29, 1989 and December 14, 1989, information obtained through personal observations and intercepted phone communications pursuant to a valid court order on the telephone line servicing the two-story residence located at 8940 Hall, Lenexa, Kansas, gave rise to evidence of a conspiracy to unlawfully sell and distribute cocaine, marijuana, diazepam, anabolic steroids, and 3,4-M.D.M.A., all controlled substances.

The claimant's attempt to controvert this statement of facts is unsuccessful for the same reasons set forth in paragraph 1.

4. Steven M. Muchnick is the sole owner of the defendant real estate.

5. Steven M. Muchnick was a defendant in United States of America v. Steven M. Muchnick et al., Case No. 90-00135-01-CR-W-8 (W.D. Mo.). Muchnick was found guilty of Counts 1-3, 5-7, 9-11, 13-14, 16-17, 19-20.[1]

6. In State of Kansas v. Steven M. Muchnick, Case No. K-68294 (Dist. Ct. Johnson County) Muchnick pleaded guilty to "use of a phone to facilitate the distribution of

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[1] The charges against Muchnick were: conspiracy to distribute Diazepam and Alprazolam, Schedule IV controlled substances (Count 1); use of a telephone in the distribution of Diazepam and Alprazolam (Count 2, 3, 6, 7, 10, 11, 14, 16, 17); distribution of Diazepam and Alprazolam (Count 5, 13); distribution of Diazepam (Count 9, 19); and theft of government property (Diazepam and Alprazolam tablets from the Veterans Administration Medical Center) (Count 20). Muchnick was not charged in Counts 4, 8, 12, 15, and 18. Muchnick was found guilty as charged following a jury trial.

marijuana."[2] In the factual basis for the charge, Muchnick agreed that he had used the phone located in the residence at 8940 Hall, Lenexa, Johnson County, Kansas, to facilitate the distribution of marijuana, a controlled substance.

The claimant has attempted to controvert this statement of fact without the citation to any evidentiary materials in support. A review of the transcript of the plea hearing reveals that Muchnick's counsel stipulated that the state could prove the above facts if the matter went to trial. Doc. 41, Exh. 4, p. 15.

7. In state court, Muchnick also pleaded guilty to the "delivery

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[2] According to the transcript of the plea hearing, this charge was Count 2 of a criminal complaint containing at least 19 counts. Doc. 41, Exh. 4, at p. 17.

of anabolic steroids.[3] In the factual basis for the plea, Muchnick admitted that he stored quantities of anabolic steroids in the residence located at 8940 Hall, Lenexa, Johnson County, Kansas and that he removed those anabolic steroids from that residence and transported them to another location in Overland Park, Kansas, after he became fearful the steroids would be discovered in the residence at 8940 Hall.

The claimant has attempted to controvert this statement of fact without the citation to any evidentiary materials in support. A review of the plea hearing reveals that Muchnick's counsel agreed that the state could prove the above

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[3] This charge was Count 15 of the same multiple count criminal complaint. Doc. 41, Exh. 4, p. 17.

facts if the matter went to trial. Doc. 41, Exh. 4, pp.15-17.[4]

The court is familiar with the standards governing the consideration of a motion for summary judgment. The Federal Rules of Civil Procedure provide that summary judgment is appropriate when the documentary evidence filed with the motion "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A principal purpose "of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . ." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The court's inquiry is to determine "whether there is the

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[4] The remaining statement of fact set forth by the United States contains matters which are inadmissible against the claimant pursuant to Fed. R. Evid. 410.

need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The burden at the summary judgment stage is similar to the burden of proof at trial. The court must enter summary judgment, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact on its claim. Rule 56, however, imposes no requirement on the moving party to "support its motion with affidavits or other similar

materials negating the opponent's claim." Id. at 323 (emphasis in original). Once the moving party has properly supported its motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials contained in the nonmoving party's pleadings, but must set forth specific facts showing a genuine issue for trial, relying upon the types of evidentiary materials contemplated by Rule 56. Fed. R. Civ. P. 56(e). Each party must demonstrate to the court the existence of contested facts on each claim it will have to prove at trial. Celotex, 477 U.S. at 324. The court reviews the evidence on summary judgment under the substantive law and based on the evidentiary burden the party will face at trial on the particular claim. Anderson, 477 U.S. at 254.

At the summary judgment stage, the judge's function is not to weigh the evidence and determine the truth of the

matter, but to determine whether there is a genuine issue for trial. Anderson, 477 U.S. at 249. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are functions of the finder of fact, not the functions of the judgment when ruling on a motion for summary judgment. The evidence of the nonmoving party is to be believed. All justifiable inferences are to be drawn in favor of the nonmovant. Id. at 255.

The court notes that the United States seized the defendant property without first providing the claimant notice and an opportunity to be heard, in violation of the claimant's due process rights. See United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993). The invalidity of the seizure on this basis, however, does not necessarily invalidate the forfeiture. The court may order forfeiture as long as impermissibly

obtained evidence is not used in the forfeiture proceeding. See United States v. 51 Pieces of Real Property, 17 F.3d 1306, 1314-16 (10th Cir. 1994).

The claimant argues that this court lacks jurisdiction over the subject matter; that the United States cannot establish probable cause for forfeiture; that the homestead exemption contained in the Kansas Constitution precludes forfeiture; and that forfeiture would constitute an excessive fine within the meaning of the Eighth Amendment to the United States Constitution.

The claimant argues that the state court first obtained jurisdiction over the defendant property and that it properly has jurisdiction over the subject matter. This court has no quarrel with the general rule that only one court may exercise in rem jurisdiction over a particular res,

and the court which first assumes jurisdiction over the res may maintain that jurisdiction to the exclusion of the other. United States v. $79,123.49 in U.S. Cash and Currency, 830 F.2d 94, 96 (7th Cir. 1987); see also Cassity v. Pitts, 995 F.2d 1009 (10th Cir. 1993). There was no violation of this general rule in the present case. In response to a Kansas Supreme Court ruling that a homestead cannot be forfeited under state drug laws, state authorities requested federal authorities to commence forfeiture. On December 18, 1992, the City of Lenexa obtained a dismissal of the state court case as it related to the defendant property. The United States Marshal seized the property on December 22, 1992, after the dismissal of the state court action. This court has had jurisdiction over the res ever since. The purpose of the rule is to prevent competition between two courts for control of one res. See $79,123.49 in U.S.

Cash and Currency, 830 F.2d at 96 (United States Marshal seized cash from the registry of the state court). This court obtained jurisdiction only after the state court relinquished it. This court has jurisdiction over the subject matter.

The relevant statute provides for the forfeiture of real property "which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment . . . ." 21 U.S.C. § 881(a)(7).

In a forfeiture proceeding, the government bears the initial burden to show probable cause for the institution of the forfeiture action, i.e., probable cause that the property was used to commit or facilitate a felony violation of Title 21, United States Code. Once probable cause has been established,

the burden shifts to the claimant to demonstrate by a preponderance of the evidence that the property is not subject to forfeiture or that a defense to forfeiture exists. The claimant bears the burden of proving that the requested forfeiture "does not fall within the four corners of the statute." United States v. $149,442.43 in U.S. Currency, 965 F.2d 868, 876 (10th Cir. 1992). Failure to rebut the showing of probable cause will support a judgment of forfeiture. Id.

The test for determining probable cause for forfeiture is the same as applies in arrests, searches and seizures. The government must demonstrate a reasonable ground for belief of guilty supported by more than a mere suspicion but less than prima facie proof. $149,442.43 in U.S. Currency, 965 F.2d at 876. "Circumstantial evidence of drug transactions may support the establishment of probable cause." Id. at 876-77 (quoting United States

v. Padilla, 888 F.2d 642, 644 (9th Cir. 1989)). Probable cause in a forfeiture proceeding may be established by hearsay. United States v. $83,900.00 in U.S. Currency, 774 F. Supp. 1305, 1320 (D. Kan. 1991); United States v. One 1987 Ford F-350 4x4 Pickup, 739 F. Supp. 554, 556 (D. Kan. 1990); see $149,442.43 in U.S. Currency, 965 F.2d 874 n.3 (hearsay may be used to establish probable cause for a search warrant). The claimant's state court convictions for offenses committed on the defendant property are sufficient to establish probable cause to connect the property to illegal drug transactions. United States v. All Right, Title & Interest, 901 F.2d 288, 292 (2d Cir. 1990). By issuing the warrant for arrest of the defendant property, the court has already made the determination that probable cause existed to show that the defendant property is forfeitable. United

States v. 9844 S. Titan Court, Unit 2, 865 F. Supp. 709, 714 (D. Colo. 1994).

Once probable cause for forfeiture has been established, the claimant may recover the defendant property only by establishing a defense to forfeiture by a preponderance of the evidence. $149,442.43 in U.S. Currency, 965 F.2d at 877. A claimant cannot sustain his burden of proof with a mere conclusory denial of guilt. 9844 S. Titan Court, Unit 9, 865 F. Supp. at 714. The claimant cannot rely on hearsay evidence to sustain the ultimate burden of proof. One 1987 Ford F-350 4x4 Pickup, 739 F. Supp. at 557.

The uncontroverted facts set forth above establish probable cause for forfeiture. In entering his guilty pleas, the claimant admitted that the state could prove that he used the

telephone in his residence at 8940 Hall, Lenexa, Kansas to facilitate the distribution of marijuana. The claimant further admitted that the state could prove that he delivered anabolic steroids from his residence at 8940 Hall, Lenexa, Kansas to the residence of another person for safekeeping. See Doc. 41, Exh. 4. Based on these facts and the uncontroverted facts set forth above regarding the conspiracy to distribute various controlled substances, the court finds that the government has established probable cause to believe the property at issue was used to commit or facilitate the commission of a felony drug trafficking crime punishable under Title 21, United States Code.[5]

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[5] While the government's pleadings have set forth a variety of other instances of wrongdoing on the part of the claimant, the government has failed to tie some of those matters to the defendant property. For example, while it is uncontroverted that Muchnick was

The burden then shifts to the claimant to prove by a preponderance of the evidence that the property is not subject to forfeiture of that a defense to forfeiture exists. Once the United States has moved for summary judgment and supported it with evidence, it is the claimant's burden to come forward with evidence (not mere allegations or denials) showing a genuine issue of material fact on the matters the claimant would have to prove at trial. A consideration of the matters submitted to the court reveals that the claimant has not met his burden.

The claimant makes the following assertions in his affidavit: he is the owner of the

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convicted of 15 drug related felonies in the United States District Court for the Western District of Missouri, it is unclear whether any of the substantive counts of distribution of controlled substances or use of a telephone involved conduct occurring at the residence at 8940 Hall, Lenexa, Kansas.

residence located at 8940 Hall; he purchased the residence at 8940 Hall on August 24, 1989 with money given to him by his mother; on December 14, 1989, the City of Lenexa seized his car and $237.00 in cash; in January 1990, the City of Lenexa instituted forfeiture proceedings against the residence at 8940 Hall, the car, and the cash; that "any activity in which I was involved in 1989 did not affect my home and my home was not needed;" that "all drugs and drug residue found in my home were drugs used by me and/or intended to be used by me for my own personal consumption;" that he successfully completed the sentence imposed by the United States District Court for the Western District of Missouri and is presently completing the sentence imposed by the District Court of Johnson County, Kansas; and that he is "drug free." Doc. 54, Exh. 1.

The claimant has submitted evidence to support his assertion that his mother gave him approximately $150,000.00 near the time he purchased the defendant property in a cash transaction. Doc. 54, Exh. 2. This fact, however, is not material to the issues in the present case. It has not been alleged that the property was purchased with proceeds of illegal activities. The source of the funds used to purchase this property is not at issue.

The initiation of forfeiture proceedings in state court regarding this property is addressed elsewhere in this opinion.

The claimant's assertion that the activities in which he was involved in 1989 did not affect his home and that his home was not needed is insufficient to raise any genuine issue of material fact. The statute requires that there be a sufficient "nexus" between the

defendant property and the claimant's involvement in drug trafficking. $149,442.43 in Currency, 965 F.2d at 877; United States v. Harris, 903 F.2d 770, 777-78 (10th Cir. 1990) ("nexus" test for criminal forfeiture, 21 U.S.C. § 853(a)). The statute does not require proof that the real property was essential, integral or indispensable to the transaction, only that the property was used to commit or facilitate the commission of a drug trafficking offense. The uncontroverted facts establish that the property facilitated the commission of the offenses. The claimant's use of his residence allowed him to conduct his drug activity in private, away from the detection of the police. The property was used to store drugs, to take phone calls and to transact drug business. The property had a sufficiently extensive involvement with the crime to justify forfeiture. See 9844 S. Titan Court, Unite 9, 865 F. Supp. at 715.

The claimant's assertion that the drugs found in the residence were intended for his personal consumption is likewise insufficient to raise any genuine issue of material fact. The government has established probable cause for forfeiture based on the claimant's guilty pleas to state law felony offenses of use of a telephone to facilitate the distribution of marijuana (a felony under 21 U.S.C. § 843(b)) and delivery of anabolic steroids (a felony under 21 U.S.C. § 841(a)(1)) and the uncontroverted facts setting froth evidence of a conspiracy to distribute various controlled substances (punishable under 21 U.S.C. §846). Whether the claimant possessed controlled substances for personal consumption, even if true, does not defeat the finding of probable cause based on the uncontroverted facts before the court.

Whether the claimant has successfully completed the criminal penalties imposed upon him is relevant (if at all) only as it relates to his Eighth Amendment challenge, which the court addresses later in this opinion. Finally, whether the claimant is "drug free" is not material to any defense to this forfeiture action.

The claimant argues that his homestead is protected from forfeiture by the Kansas Constitution. The Kansas Supreme Court has ruled that forfeiture (under Kansas statute) of a homestead for drug trafficking offenses violates the homestead exemption contained in the Kansas Constitution. State ex rel. Braun v. A Tract of Land, 251 Kan. 685, 840 P.2d 453 (1992).

The present action is brought under the federal civil forfeiture statute, 21 U.S.C. § 881, which preempts state law as to the

forfeitability of homestead property. United States v. Lot 5, Fox Grove, 23 F.3d 359 (11th Cir. 1994), cert. denied, 115 S. Ct. 722 (1995); United States v. One Parcel of Property, 786 F. Supp. 1497, 1504 (N.D. Iowa 1991); United States v. One Single Family Residence, 771 F. Supp. 1214, 1216 (S.D. Fla. 1991).

The claimant next argues that the forfeiture of his residence would constitute an excessive fine. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The United States Supreme Court has held that the Eighth Amendment's excessive fines clause applies both to in rem civil forfeiture actions, Austin v. United States, 113 S. Ct. 2801 (1993), and in personam criminal forfeiture actions. Alexander v. United

States, 113 S. Ct. 2766 (1993). The Supreme Court declined to establish a test to determine when a forfeiture is excessive. Austin, 113 S. Ct. at 2812.

The Tenth Circuit appears to have adopted the Eighth Circuit's test on excessiveness. The Tenth Circuit has stated that the court must consider "all factors" when evaluating whether a forfeiture is excessive. United States v. Libretti, 38 F.3d 523, 531 (10th Cir. 1994) (criminal forfeiture pursuant to 21 U.S.C. § 853) (citing United States v. Bieri, 21 F.3d 819, 824 (8th Cir. 1994), cert. denied, 115 S. Ct. 208 (1995)). Those factors include the extent of the criminal drug activities, the length of time encompassed, and the relationship between the property and the criminal offenses. Bieri, 21 F.3d at 824.

Factors to consider in the Eighth Amendment analysis also include: the monetary value of the property, the extent of criminal activity associated with the property, the fact that the property was a residence, the effect of forfeiture on innocent occupants of the residence, including children, "or any other factors that an excessive fine analysis might require." United States v. One Parcel of Real Property, 27 F.3d 327, 331 (8th Cir. 1994) (civil forfeiture pursuant to 21 U.S. C. §881).

In the present case, the length of time the defendant property was involved in drug activities is unknown to the court. However, during the period of time in which law enforcement officials were monitoring the claimant's telephone, the claimant appears to have been involved in very extensive drug trafficking activities from his home. During the period November

28, 1989 to December 14, 1989, 1,509 phone calls were intercepted. Of that total, 689 were calls placed or received in which actual conversation ensued. Of those 689 calls, 154 conversations involved drugs and/or drug use. Ninety-four conversations involved actual drug transactions. The calls in which no conversation ensued included incoming/outgoing calls in which there was no answer, outgoing calls in which the number called was busy, and outgoing calls to a pager. (See Doc. 57, Exh. 2). The monetary value of the property is approximately $158,000, which is significantly less than the amount the claimant could have been fined under the federal criminal code or under Kansas state law upon conviction. The fact that the property is a residence may in some cases weigh against forfeiture. However, in the present case, no innocent owners or occupants would be affected by forfeiture. the offenses to which the claimant

pleaded guilty in state court occurred on the property. Based on a consideration of these factors, the court finds that the forfeiture of the claimant's residence does not constitute an excessive fine.

Further, as noted above, the value of the property to be forfeited is well within the statutory maximum fine which could have been imposed upon a felony drug conviction. Had the claimant been found guilty in federal court of the drug charges to which he pleaded guilty in state court, he faced a maximum fine of $500,000 pursuant to 18 U.S.C. § 3571. The claimant was apparently not fined in the District Court of Johnson County. Following his state court conviction, the defendant was placed on probation. Doc. 54, Exh. 4. Apparently the claimant's car (of unknown value) and $237.00 in cash have been forfeited in state court. In the United States District Court for the Western District of Missouri, the

claimant was fined $1,200 and placed on probation following his conviction on fifteen felony drug counts. Doc. 54, Exh. 3. The claimant could have been fined nearly $4 million for those offenses.

The Tenth Circuit has held that a forfeiture of $410,000 in property was not excessive when the statutory maximum fine which could have been imposed was $2,000,000 and the defendant was fined only $5,000. Libretti, 38 F.3d at 531. Similarly, the forfeiture of the claimant's house (worth approximately $158,000) is not excessive in light of the fines which could have been imposed upon the claimant.

IT IS BY THE COURT THEREFORE ORDERED that the plaintiff's motion for summary judgment against the interest of Steven M. Muchnick (Doc. 40) is hereby granted. Counsel for

the plaintiff shall prepare the journal entry.

At Wichita, Kansas, this 26 day of July, 1995.

/s/Frank G. Theis
Frank G. Theis
United States District Judge